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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ISAAC SINSUN, Defendant and Appellant.	2d Crim. No. B284836 (Super. Ct. No. 2016006819) (Ventura County)

A jury convicted Isaac Sinsun of first degree murder. (Pen. Code, §§ 187, subd. (a), 189, subd. (a).)[1] He challenges (1) the exclusion of unreliable out-of-court statements that do not fall within the penal interest exception to the hearsay rule; (2) a consciousness of guilt instruction arising from his boasts of destroying evidence tying him to the murder; (3) the court's failure to appoint new trial counsel, though appellant did not ask for new counsel or show an irreconcilable conflict; (4) the imposition of fines, fees and restitution; (5) the paucity of

[1] Unlabeled statutory references are to the Penal Code.

favorable "youth offender" evidence at sentencing; and (6) the application of the felony murder rule.

We conclude that none of appellant's arguments have merit. The evidence against him is overwhelming. He admitted to the murder on multiple occasions, orally and in writing. We affirm.

FACTS AND PROCEDURAL HISTORY

Joaquin Castaneda died from a point blank shotgun blast to his head on the evening of November 13, 2005; the shot cup was embedded in his skull. Leading away from his body were bloody tire tracks and bloody footprints. He wore a Pinkerton Security uniform shirt. His back pocket was pulled out and his wallet, identification and cell phone were missing.

The shooting occurred in a poorly-lit industrial area in Oxnard. A witness, Frank Ramos, heard people arguing in a car parked directly behind his van; a man yelled, "[G]et the fuck out" followed by the sound of a heavy gauge gunshot. Ramos next heard two men next to his van whispering, "Come on. Hurry up. . . . Let's go. Let's get the fuck out of here." A third man calmly replied, "Hold on." Ramos heard car doors shutting, looked out, and saw two cars driving away from the scene. Ramos found Castaneda on the ground behind the van.

Another witness, Victor Ortiz, heard arguing and a gunshot come from a car. He hid behind bushes. He heard the word "vamanos" and car doors closing after the gunshot. Ortiz saw a pick-up truck and a sedan drive away. He called police.

When police found Castaneda's sedan the following morning, it had blood stains on the exterior and tires. The driver's seat was soaked in his blood. It appeared he was shot while seated then pulled from the car.

One day after the homicide, a red pick-up truck parked at a motel in Oxnard drew police attention because its rear license plate was missing and the front plate was upside down. A woman opened a motel room door then immediately closed it when she saw officers examining the truck. They knocked on her door. In the room they found Valerie Corona, her husband, her brother and her cousin, appellant Sinsun.

Corona authorized police to search the truck for her identification. During the search, officers found bloody clothing behind the driver's seat. Crime lab analyses showed that the clothing--a white T-shirt, a black long-sleeve shirt and black pants--bore Castaneda's blood DNA. The seat of the pants was saturated with blood. The stain went through the material into the pocket inserts, as if the person wearing them was sitting in a pool of blood. Officers found blood spatter on a bed sheet in the truck; they found identical sheets (the same color, pattern, size and manufacturer) in Castaneda's car.

Appellant was detained under a search warrant for DNA testing. The clothing recovered from the pick-up truck carried "ownership DNA" from either appellant or his identical twin David. Forensic DNA tests cannot differentiate between identical twins. Photos of appellant's body showed a circular bruise on his right shoulder; a firearms expert opined that it was caused by the recoil of a shotgun.

Investigators enlisted an informant, Ismael Cano, to get jailhouse statements from appellant. Police told Cano they sought information on a homicide in an industrial area in Oxnard, without specifying that a car or shotgun was involved. Appellant was in custody, though not for killing Castaneda. He was moved to a cell with a recording device, near Cano.

Detectives arranged to take a DNA swab from Cano in front of appellant, to give Cano more credibility and trigger a conversation between them. It was Cano's idea to say he is in the Mexican Mafia, a gang that carries out killings in prison. Appellant is a Colonia Chiques gang member. Bragging about gang crimes while incarcerated enhances one's status.

Conversations between appellant and Cano were recorded on March 15-19, 2006. After a number of friendly exchanges, Cano told appellant he was swabbed for DNA on an alleged homicide; appellant said his DNA was taken for the same reason. Appellant said that his home was searched and his clothing was taken, but police "had nothing 'cause us, we torched everything, homie;" plus, he got rid of "the big thing" by selling it.

Cano said he trusted appellant and claimed to have killed a "white boy" with a nine millimeter Beretta, dumping the body in an alley. Appellant responded that he used "a shottie" (shotgun). Cano commended appellant, telling him that police cannot use ballistics on "the little bullitos" from a shotgun. Appellant disagreed, saying that police can get ballistics "off anything, homie." Appellant said that the shooting was outdoors and the victim was in a car.

Appellant told Cano "you gotta burn everything" because blood spatter can travel. Appellant said he fired "[p]oint blank. And I didn't see nothing on my clothes. You just can't take a chance." Appellant was not perturbed when his clothing was taken for DNA testing at the Oxnard police station because "it was all brand new." Appellant stated that he watches forensic programs to learn how police investigate crimes.

Cano told appellant that there is "a pegada [hit] on you and your brother, fool. They're waiting for you to get up to the joint

[prison]" because "you guys blasted somebody's jefe from Southside, a civilian." Appellant exhaled audibly and said, "[f]uck." He explained, "[w]e smoked" (shot) a "vato" (guy) in a car parked in a commercial area, believing he was an undercover police officer, adding "we just got a personal beef with the juras [police], you know." He and his brother wanted to "do some fuckin' damages, so we rolled up on this fool." When Castaneda resisted, "we domed this fool," meaning they shot him in the head. Appellant was pleased "we got one" because he and his brother hoped to catch a police officer "slipping."

Appellant spoke to Miguel Alvarez, an inmate with Mexican Mafia tattoos. Alvarez previously served as an informant. Though he was not working for Oxnard police in appellant's case, he gave them information from appellant. In a conversation, appellant told Alvarez that he and David killed a man in a car, believing him to be an undercover officer, by shooting him in the head. Appellant explained to Alvarez that he later learned the victim was the father of a rival gang member named Lucky, who intended to harm appellant and David. Appellant wanted help from Alvarez, who instructed appellant to put his request in writing.

In a "kite" (prison note) to Alvarez, appellant wrote, "we own up to what we did" on the "jefe" (father) of gang member Lucky, who thinks that appellant was trying "to get at him" by killing his father. Lucky had approval to kill appellant and his brother, once they went to prison. Appellant wrote that he mistakenly believed Castaneda was a police officer in an unmarked car. The victim seemed to reach for a weapon when they told him to get out of the car, so "we do what we have to." Appellant asked Alvarez "what should we do to get it

straightened out. . . . I need some advice on what direction to go." Appellant also asked Alvarez to destroy the kite.

Yvette Baird rented a room in appellant's house in 2014. She witnessed an argument between appellant and his mother, who screamed at him, "I know you killed him." Appellant struck his mother to the ground and told her to shut her mouth. He did not deny her accusation. Baird later bumped into appellant accidentally in the hallway of his home. He pulled out a knife, pushed Baird against the wall, put the knife to her throat and said "he had killed before, he'd kill again. Killing [Baird] would mean nothing. Stay out of his way." Baird moved out of appellant's house.

Appellant's cousin Valerie Corona testified on his behalf. She stated that appellant's twin David was wearing black pants and a black shirt on the morning of November 13, 2005, similar to the ones police found in her pick-up truck. The next time she saw David, that evening, he was carrying similar-looking clothing, rolled up. When police found the bloody pants in Corona's truck the next day, they asked her to whom they belonged; she said that she did not know. Later, David told Corona that the clothing was his and explained that he and two friends shot someone in a car the previous night, during a robbery. Corona did not tell police that David committed the murder. She did not say anything about David's admission until she spoke to a defense investigator in May 2017, shortly before appellant's trial.[2]

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[2] Corona's testimony was inconsistent. Her recorded statement to the defense in May 2017 indicated that she loaned the pick-up truck to David on the evening of the murder and he returned it the following morning. At trial, she changed course

Appellant was charged in 2016 with first degree murder. (§§ 187, subd. (a); 189, subd (a).) The jury convicted him of the charge in 2017. He received a mandatory sentence of 25 years to life.

DISCUSSION

Exclusion of David Sinsun's Hearsay Statements

In statements to law enforcement and appellant's defense team in 2016 and 2017, David claimed ownership of the clothing police found in Valerie Corona's pick-up truck; claimed that blood got on the clothing when he sat down in an unoccupied car on the street; and denied that appellant committed the crime. The court excluded David's statements. However, it allowed Corona to testify that David admitted to the shooting and said the clothing belonged to him. Appellant argues that the exclusion of David's statements impaired his right to a fair trial. There was no abuse of discretion in excluding David's hearsay statements.

a. Overview of the Penal Interest Exception to the Hearsay Rule

Hearsay is inadmissible because "'the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements.' [Citations]." (*People v. Duarte* (2000) 24 Cal.4th 603, 610 (*Duarte*).) An exception allows admission of an out-of-court statement if the proponent shows (1) the declarant is unavailable, (2) the

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and denied loaning the truck to David. Corona told police on November 14, 2005, that appellant was not with her the evening of the murder; by contrast, at trial she testified that appellant was with her, helping her move, although he may not have been with her at the exact time of the murder.

statement was distinctly against the declarant's penal interest and (3) it is sufficiently reliable to warrant admission despite its hearsay character. (*Id.* at pp. 610-612; Evid. Code, § 1230.)

The trial court determines the foundational elements of hearsay exceptions. We review for substantial evidence the court's findings on foundational facts and review the ultimate ruling for an abuse of discretion, deferring to the court's view of the particular facts of the case. (*People v. Jackson* (2016) 1 Cal.5th 269, 320-321; *People v. DeHoyos* (2013) 57 Cal.4th 79, 132.)

b. David Was Unavailable

The first element of the penal interest exception was met. David was unavailable to testify because he invoked his Fifth Amendment right not to incriminate himself. (*Duarte*, *supra*, 24 Cal.4th at pp. 609-610.)

c. David's Statements Were Not Against His Penal Interest

Substantial evidence supports the court's finding that David's statements to law enforcement were not against his penal interest. He told investigators that the pants recovered from Corona's truck "are mine. I can't tell you how the dude's DNA evidence got on 'em, but the pants are mine." When a detective asked how blood got on the pants, David declined to explain. He declared that appellant "was not involved" but offered no corroborating information. He "wanted some kind of deal and guarantees prior to giving additional information about the crimes," including promises that he would receive no more than 20 years, concurrent with the sentence he was already serving, and anything he said would not be used against appellant. David implied that appellant "was not the shooter and should only be charged as an aider and abettor and an accessory."

A statement admitting possible criminal culpability may be self-serving: the declarant may be attempting to shift blame or curry favor. The statement must be viewed in context to determine if, on balance, it is inculpatory or exculpatory. (*Duarte*, *supra*, 24 Cal.4th at pp. 611-612.)

David did not admit to a crime. He denied knowing "how the dude's DNA" got on his pants. He wanted a "deal" before he would give useful information. He claimed appellant "was not involved," yet hinted that appellant was an aider and abettor. David's statements neither inculpated himself as the murderer nor exculpated appellant. The statements were not distinctly against David's penal interest. He sought to "minimize his responsibility or shift blame to others" and did not "assume[] sole responsibility" for the crime. (*People v. Grimes* (2016) 1 Cal.5th 698, 717.) A reasonable person in David's position would not think his vague statements would subject him to criminal liability. (*Ibid.*; Evid. Code, § 1230.)

d. David's Statements Were Unreliable

The court found David's statements unreliable. It focused on a April 29, 2016 letter found in David's prison cell to appellant's counsel. David's letter acknowledged that investigators "found one speck of DNA on a shirt but that's probably a set up." He noted that "we are identical twins with the same DNA" and offered his help, writing, "I'll be glad to go on the stand and do everything I can with your help to look guilty as hell in front of a jury. I know you need someone to blame so I'm your man. . . . So have your investigator come talk to me. I'd like to see the discovery. And if I deem it so I'll take the full blame if it don't [*sic*] look good for Isaac. But he has to get full immunity

of that case and anything and everything else they were looking into." [3]

As identical twins, either David or appellant could have contributed ownership DNA to the clothing found in Corona's truck. However, only appellant admitted to the crime, first in a jailhouse recording, then in a prison conversation with Alvarez, and later in a "kite." When viewed in context with appellant's admissions, asking defense counsel to make David "look guilty as hell in front of a jury" to spare appellant from prison shows inherent unreliability.

In examining a statement against penal interest and whether it "is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) If over a decade has passed since a shooting, the court may find the statement untrustworthy. (*Ibid.*)

Appellant was charged eleven years after the murder. David was already incarcerated and offered to take the blame, but only if he personally reviewed discovery and decided the prosecutor had a strong case against appellant. "The significant passage of time is a relevant circumstance to be considered when determining a statement's reliability. In fact, [the declarant] did not make his statements until after these charges had been filed." (*People v. Masters* (2016) 62 Cal.4th 1019, 1057 [declarant's statements were unreliable as a convicted felon who "waited for over a year" to admit his involvement in a killing].)

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[3] The brothers were implicated in two murders (including Castaneda's) plus an attempted murder.

Adding to the untrustworthy nature of a convicted felon's belated offer to take the blame to spare his twin, the court noted David's inconsistencies and attempts to blame third parties. "[A] hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' [Citations]." (*Duarte*, *supra*, 24 Cal.4th at p. 612.)

In an August 2016 letter to appellant's defense counsel, David wrote, "I want to tell you in strict confidence that the clothes may have been mine. I'm not positive but what I believe happen [*sic*] was that at the particular time I was walking down the street and came upon a parked car with no one in it. I open[e]d the door and looked if there was anything worth stealing. When I sat in the car there was water in the seat. But later I found out it was blood when the police told me that. It was at night so I didn't know. I threw the clothes in the truck they found the clothes in cause [*sic*] I thought they were wet with water. But Isaac did not have anything to do with this." In a meeting with defense investigators in May 2017, David said he had various guns but "never" used a shotgun.

David's claim of sitting on a bloody car seat conflicts with his statement to detectives that he had no idea "how the dude's DNA" got on his pants. He was unsure these were his clothes, saying they "*may have been* mine." David claimed he "never" used a shotgun, the weapon used to kill Castaneda. The statements exonerated David, who purportedly found the victim's unoccupied car by chance on the street. He denied participation in a murder. This was not against his penal interest.

e. Appellant Was Not Prejudiced

Appellant claims prejudice because "the jury never knew" David incriminated himself or claimed ownership of the bloody clothes. He misstates the record. The jury heard David's admissions because the court allowed Corona to testify that David said (1) he and two friends shot someone during a robbery and (2) the clothing police found in the truck was his. She also said that on the day of the murder, David was wearing black clothing similar to that found in her truck; she later saw him carrying the clothing, rolled up. Corona waited nearly 12 years to reveal David's statements. The jury was not swayed by news of David's involvement, given the overwhelming evidence of appellant's guilt.

David's statements could not raise a reasonable doubt about appellant's guilt. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 327 [64 L.Ed.2d 503, 510]; *People v. Panah* (2005) 35 Cal.4th 395, 481-482.) On the contrary, David implicated appellant as an aider and abettor in the killing. Excluding David's statements did not prejudice appellant.

e. Appellant's Constitutional Rights Were Not Violated

Citing *Chambers v. Mississippi* (1973) 410 U.S. 284 [35 L.Ed. 297], appellant claims a due process violation from the exclusion of David's statements. The case is inapposite. Chambers was charged with killing a police officer. A man named McDonald admitted he was the shooter in a sworn confession, but later recanted. Mississippi did not recognize statements against penal interest as an exception to the hearsay rule. (*Id.* at pp. 286-289, 298-299.) The high court concluded that Chambers was unfairly denied an opportunity to cross-examine McDonald as an adverse witness or call other witnesses

to whom McDonald confessed. (*Id.* at pp. 294-296.) The court rejected a mechanistic application of the hearsay rule to defeat the ends of justice. (*Id.* at p. 302.)

Unlike the *Chambers* case, David never confessed under oath to the killing. His statements were vague and self-exculpatory. He claimed ignorance how Castaneda's DNA got on his pants, then said he entered an unoccupied car and sat in blood while looking for things to steal.

Appellant incorrectly asserts that constitutional law divested the trial court of discretion to exclude David's statements. "The situation present here is not, as defendant argues, comparable to the exclusion of evidence that otherwise 'bore persuasive assurances of trustworthiness' found by the high court to have violated due process in *Chambers v. Mississippi* [citation omitted]. Rather, as we have stated before, the 'foundational prerequisites are fundamental to any exception to the hearsay rule.' [Citation.] '"[A] defendant does not have a constitutional right to the admission of unreliable hearsay statements." [Citation.]' Application of 'the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citations.]" (*People v. Westerfield* (2019) 6 Cal.5th 632, 705.) David's out-of-court statements were not persuasive, trustworthy or against his penal interests. They were inadmissible hearsay.

Consciousness of Guilt Instruction

The jury was instructed on consciousness of guilt.[4] Defense counsel objected, saying there was no evidence appellant hid

[4] The instruction reads, "If the defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up

evidence because police found the bloody clothing. The prosecutor replied that the shotgun used in the murder was gone, lending credence to appellant's jailhouse claim of disposing of it.

The instruction was appropriate. Appellant was recorded in jail saying that police "had nothing" because he torched his clothing and got rid of "the big thing" by selling it; he later specified that the big thing was a shotgun. The murder weapon was never recovered. Appellant's boast of getting rid of the shotgun was """some evidence in the record which, if believed by the jury, will sufficiently support [an] inference""" that he disposed of adverse evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 330 [consciousness of guilt instruction was appropriate because defendant admitted he threw the murder weapon from his car while driving].)

Appellant's statement that he shot the victim "[p]oint blank" and "didn't see nothing on my clothes" but got rid of them because "[y]ou just can't take a chance" tends to show consciousness of guilt with respect to how he behaved when shooting someone at close range. This included purchasing new clothing in case police seized the apparel he wore, as happened to appellant. A defendant's "fictional first person narratives . . . describing the events surrounding the murder" may be presented to the jury as a circumstance tending to show consciousness of guilt. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 97-98.) Appellant's boast of torching all incriminating clothing that might have blood spatter may be fictional (because police found bloody clothing), but under *Stankewitz*, it shows consciousness of

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to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." (CALCIM No. 371.)

guilt. Appellant also showed consciousness of guilt by asking Alvarez to destroy the "kite" in which appellant owned up to the murder while explaining or justifying his actions.

The evidence-destroying scenario painted by appellant is tempered by cautionary language in CALCIM No. 371 that the jury should consider the meaning and importance of his attempt to hide evidence but not use it, without more, to prove guilt. As shown in the next section, there was ample evidence of appellant's guilt

The Evidence Against Appellant Is Overwhelming

A judgment cannot be set aside for jury misinstruction, improper exclusion of evidence, or any procedural matter unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) We have reviewed the entire record and conclude that the evidence against appellant is so overwhelming that any purported error in the conviction did not result in a miscarriage of justice.

Appellant admitted guilt. He was recorded saying that he fired a shotgun "point blank" into a man's head. The coroner's testimony bears out that the weapon used to kill Castaneda was a shotgun fired from a fraction of an inch away. Despite his proximity to the victim, appellant did not see blood on his clothes, but said that he got rid of them, just to be sure. He was wearing new clothes when police seized his attire for testing. Appellant said he disposed of the shotgun following the murder to avoid being linked to the crime. The weapon was never recovered.

Appellant and David "rolled up" on Castaneda wanting to "do some fuckin' damages" because they believed he was a police officer in an unmarked car. Appellant has "a beef" with the police. He wanted to harm an officer and was pleased "we got

one." His words support a finding that he committed a willful, deliberate and premeditated homicide, either as the actual shooter or as a direct aider and abettor to the shooter. (*People v. Chiu* (2014) 59 Cal.4th 155, 166-167; *People v. Gomez* (2018) 6 Cal.5th 243, 282-283 [premeditation and deliberation was shown because victims were shot "from close range in the head or neck"].)

Believing there was a hit on him and David in prison, in retaliation for Castaneda's killing, appellant sought assistance from an inmate in the Mexican Mafia. In a written note, appellant took responsibility for ("owned up to") the shooting that took Castaneda's life. He justified the killing by saying that Castaneda appeared to be a police officer in an unmarked car. Appellant wanted to placate a rival, Lucky, by explaining that he did not kill the victim to provoke Lucky's ire.

Supporting appellant's self-incriminating words, testing on blood-stained clothing found in a pick-up truck outside appellant's motel room bore Castaneda's blood DNA and ownership DNA from appellant or David. The truck also contained a blood stained bed sheet matching ones found in Castaneda's car. A circular bruise on appellant's shoulder appeared to be from the recoil of an improperly shouldered shotgun.

A witness heard a man yell "Get the fuck out" followed by a gunshot. Castaneda was pulled from the car and left to die on the ground while the assailants drove away with his vehicle. Castaneda's back pocket was pulled out and his wallet and telephone were missing. A witness heard a gunshot and saw a pick-up truck and a sedan leaving the scene. The evidence

supports a finding that the homicide was committed to facilitate a carjacking and robbery.

Years later, appellant's mother accused him of the killing. He did not deny it, struck his mother, and told her to shut her mouth. A witness to this exchange was later threatened by appellant, who put a knife to her throat while saying he had killed before and would kill again.

Marsden Hearing[5]

Appellant argues that the court should have held a *Marsden* hearing. However, he did not ask to discharge counsel, substitute a new attorney, or claim that counsel's inadequate performance abridged his rights. Instead, he first complained that his attorney should have convinced the court to exclude his jailhouse interaction with Cano. The court responded that the matter was thoroughly litigated and the ruling was sound. Near the end of the trial, appellant told the court he disagreed with his attorney's decision not to call a deputy to explain why he moved appellant. When the court explained that this was a "tactical decision," appellant replied, "Okay. Thank you."

Appellant's comments did not trigger a *Marsden* inquiry. There must be "'some clear indication by defendant that he wants a substitute attorney'" and a mere "'difference of opinion . . . over trial tactics'" does not require a hearing. (*People v. Valdez* (2004) 32 Cal.4th 73, 97 [no hearing required when defendant did not ask to replace counsel, but "merely complained about his defense and argued that additional witnesses should be questioned"].)

Assuming appellant implicitly requested new counsel, he is only "entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation

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[5] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations]." (*People v. Crandell* (1988) 46 Cal.3d 833, 854.) No such showing was made here. Defense counsel tried to exclude the jailhouse recording, without success; appellant does not contest the soundness of the court's ruling on appeal. There was no effort to show how a deputy's testimony about moving appellant would improve his case. At most, he disagreed with his attorney over trial tactics. Nothing in the record suggests an irreconcilable conflict between appellant and his attorney that affected his representation. "A trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel . . . ." (*Id.* at p. 860; *People v. Myles* (2012) 53 Cal.4th 1181, 1207.) The court had no basis to find a conflict between appellant and counsel.

Franklin Hearing[6]

Appellant was 21 years old in 2005, when Castaneda was murdered. A person who, when under the age of 25, commits a crime with a determinate sentence of 25 years to life is eligible for release on parole as a youth offender. (§ 3051, subds. (a), (b)(3).) The Board of Parole "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." (§ 4801, subd. (c).) To carry out the statutory mandate, an offender must have a "sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing" during sentencing. (*Franklin*, *supra*, 63 Cal.4th at pp. 283-284.)

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[6] *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

Section 3051 was enacted before appellant was sentenced. (Compare *Franklin*, *supra*, 63 Cal.4th at pp. 285-286 and *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1130-1132 [defendants entitled to remand because section 3051 was enacted after their sentencing hearings].) Appellant had "the opportunity and incentive to put information on the record related to a future youth offender parole hearing." (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1088-1089.)

Appellant was not deprived of a *Franklin* hearing. His counsel asked for additional time to prepare for "a more extensive sentencing hearing than normal" because appellant was age 21 at the time of the crime and "has a right to a parole hearing within 15 years even though it's 25 to life." At sentencing, counsel argued that appellant "was heavily involved" with a street gang from age 12 to 21; was living on the streets instead of with his parents; and he and David "had totally given themselves over to the gang." After shooting Castaneda, appellant committed an assault with a deadly weapon, was imprisoned and renounced gang activity, though not other criminal behavior such as domestic violence, resisting arrest and drug offenses. Counsel concluded, "[s]o his youth, his involvement with the gang" and drug use contributed to appellant's behavior, but "he did make a significant change in his life" after going to prison.

Defense counsel was aware of appellant's right to a more extensive sentencing hearing to create a record for a future parole hearing. Although counsel did not submit evidence from "[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about [appellant] before the crime or his or her growth or maturity since the time of the crime . . . ." (§ 3051, subd.

(f)(2)), he cited youth-related factors such as gang involvement and drug abuse, and insisted that appellant no longer had these problems. The probation report states that appellant joined a gang at age 11 or 12; used methamphetamine for seven years; and was in juvenile custody, where he was violent with staff and other minors, yet also obtained a high school diploma.

Appellant contends that defense counsel was ineffective at presenting favorable information at sentencing. He has not carried his burden of demonstrating that counsel's investigation was deficient, plus a reasonable probability he could have obtained a more favorable outcome. (*People v. Rich* (1988) 45 Cal.3d 1036, 1096.) He does not identify any evidence that counsel could have submitted at the *Franklin* hearing, that was not included in the probation report or in argument. As a result, appellant has not shown prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 691-692 [80 L.Ed.2d 674, 696]; *In re Avena* (1996) 12 Cal.4th 694, 721.)

Restitution

In supplemental briefing, appellant contends that the court imposed victim restitution, fines and fees without finding that he has the ability to pay. The court ordered him to pay $13,000 to Castaneda's family for funeral expenses; an agreed-upon fee of $300 for the public defender; $40 in court security fees; and a $30 conviction assessment. The court did not order appellant to pay for the presentence investigation report. It ordered, but stayed, a $1000 payment to the State Restitution Fund and a $1000 parole revocation fine.

The challenge is forfeited because appellant did not object. (*People v. Avila* (2009) 46 Cal.4th 680, 729 [defendant's claimed inability to pay restitution was forfeited by the absence of an

objection].) An objection is required to claim constitutional rights violations, such as appellant makes here. (*People v. Trujillo* (2015) 60 Cal.4th 850, 859 [no constitutional rights are implicated by counsel's failure to object at sentencing to the imposition of fees].) The defendant has the burden to demonstrate why a fine should not be imposed. (*Avila* at p. 729; *People v. Gamache* (2010) 48 Cal.4th 347, 409 [defendant cited no evidence that he is unable to pay restitution, other than his incarceration].)

Appellant relies on *People v. Duenas* (2019) 30 Cal.App.5th 1157, 1161-1163, a misdemeanor suspended license case, in which the defendant requested an ability-to-pay hearing and the court expressly found she lacked ability to pay $220 in fees and fines. *Duenas* does not assist appellant, who did not object that he was unable to pay fees or fines. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153.) A court must order restitution to compensate for victims' economic loss. (§ 1202.4, subd. (f).) The defendant "has the right to a hearing before a judge to dispute . . . the amount of restitution." (*Id.*, subd. (f)(1).) Appellant did not dispute the Castaneda family's funeral expenses.

New Legislation

In supplemental briefing, appellant cites new legislation, effective January 1, 2019, affecting felony murder convictions. The prosecution argued for first degree murder based on the felony murder rule *or* willful, deliberate, premeditated homicide. The jury was instructed on both theories.[7] Appellant was

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[7] On felony murder, the jury was instructed that appellant (1) committed or aided and abetted a robbery or carjacking; (2) intended to commit or intended to aid and abet the perpetrator in

convicted of first degree murder, but the verdict form does not reveal the theory of guilt.

Under the new law, malice cannot be imputed based solely on participation in a qualifying crime. (§ 188, subd. (a)(3).) If a homicide is committed during a carjacking or robbery, one of the following must be proven: the defendant (1) was the "actual killer;" (2) was not the actual killer, but with the intent to kill aided and abetted or assisted the actual killer; or (3) was an aider/abettor who was "a major participant" in the underlying felony and acted with reckless indifference to life. (§ 189, subds. (a), (e).)

The new legislation allows a person "convicted of felony murder . . . [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated . . . " if the charges against the defendant allowed the prosecution to proceed under a felony murder theory, he was convicted of first degree murder, and the conviction is not permissible under section 189. (§ 1170.95, subd. (a)(1)-(3).)

Appellant argues that section 189 entitles him to an "automatic and mandatory reversal." However, two recent cases hold that a defendant convicted of felony murder is not automatically entitled to a reversal in a pending appeal. Instead, the defendant must petition the sentencing court to obtain the findings required by section 189. We agree with these cases.

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committing a robbery or carjacking; (3) if he did not personally commit a robbery or carjacking, the defendant or perpetrator, whom defendant was aiding and abetting, committed a robbery or carjacking; and (4) while committing a robbery or carjacking, the defendant or perpetrator caused the death of another person.

Division Five of this District analyzed the new legislation in *People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*). Like appellant, Martinez was convicted of first degree murder and argued that section 189 is retroactive, the jury was incorrectly instructed, the judgment must be reversed, and the case remanded for a new trial. (*Martinez* at p. 724.) The court wrote that section 1170.95 "does not distinguish between persons whose sentences are final and those whose sentences are not," which is "a significant indication [the law] should not be applied retroactively to nonfinal convictions on direct appeal." (*Id.* at p. 727.) A defendant must submit a declaration showing eligibility for relief and may present new evidence; the prosecution has the opportunity to present new and additional evidence to demonstrate that the defendant is not entitled to resentencing. Going beyond the original record with new evidence is not available on direct appeal from the judgment. (*Id.* at pp. 727-728) The *Martinez* court concluded that the defendant had no right to automatic reversal of his sentence on direct appeal. (*Id.* at p. 729.)

Martinez was followed in *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1149-1154, in which the court required the defendants to wait for the resolution of their appeal before petitioning the trial court under section 1170.95. They were not entitled to immediate retroactive relief and the appellate court cannot "'be asked to review conflicting judgments, each with different errors to be corrected' [citation]" if the trial court rules on a petition while the appeal is pending. (*Id.* at p. 1156.)

Martinez and *Anthony* dispose of appellant's arguments. They establish that he must bring a petition under section

1170.95 before the sentencing court to obtain relief, once his appeal is final.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

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